

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANTS: Carey S. Nachenberg et al.
SERIAL NO.: 10/046,496
FILING DATE: October 29, 2001
TITLE: Temporal Access Control for Computer Virus Outbreaks
EXAMINER: Jeffery L. Williams
GROUP ART UNIT: 2137
ATTY. DKT. NO.: 20423-05957

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Brian Hoffman, Reg. No. 39,713

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REPLY BRIEF

This Reply Brief is filed in accordance with 37 CFR § 41.41 in response to the Examiner's Answer, which was mailed on May 18, 2009.

Argument – The Independent Claims are not Obvious in view of Bates and Hericourt

The arguments put forth by the Examiner in the Answer of May 18, 2009 fail to rebut Appellants' arguments. The claimed invention relates to determining the executability of computer code in response to a comparison between a time stamp corresponding to an earliest moment (or first time) computer code was allowed to execute on a network and a virus alert time. As Appellants previously argued, the cited references, whether considered individually or in combination, fail to disclose a time stamp "corresponding to an earliest moment the computer code was allowed to execute on a computer..." or "corresponding to a first time the computer code was allowed to execute on a computer..." as variously recited by the independent claims.

The Examiner's argument hinges on the teachings of Bates, which discloses use of a single time stamp indicating the time the file was last checked for a virus. The Examiner uses Hericourt to argue that the virus checking can include an execution. However, even under this interpretation the combined references fail to disclose or suggest that the time stamp represents an earliest moment (or first time) computer code was allowed to execute. Rather, the time stamp merely represents an arbitrary execution.

The Examiner's primary response to this argument is to assert that the time stamp represents the earliest or first execution "in relation to the multitude of subsequent, secondary, or later executions within that sequence." Answer, Page 20. The Examiner's logic is flawed, however, because there is nothing in the Examiner's interpretation or the references that precludes other, *earlier*, executions from occurring. Thus, it cannot be said that the time stamp relied upon by the Examiner represents the earliest moment (or first time) the computer code was

allowed to execute. Under the Examiner's logic, every execution would be the "first" one as long as there is a subsequent execution.

In fact, the Examiner has never explained how an execution can be considered the "earliest" or "first" if there are previous executions. Instead, the Examiner has mischaracterized Appellants' argument. In the Answer the Examiner states:

...the examiner respectfully notes that appellant's admission:

'...there are an arbitrary number of executions that occur...after the execution represented by the timestamp' (Applicant's Arguments/Remarks 4/11/08, p. 14)

Answer, page 20. However, Appellants actual argument is that:

there are an arbitrary number of executions that occur **before and** after the execution represented by the timestamp.

(emphasis added). Thus, the Examiner has used ellipses omit Appellants' central contention from the quote and avoid addressing the main issue: an arbitrary number of executions can occur before the execution that the examiner designates "first."

The Examiner also mischaracterizes the teachings of Appellants specification. At page 22 of the Answer, the Examiner attempts to equate the claimed invention with the references by alleging that Appellants specification shows that the claimed timestamp

represents a time when an executable file is virus checked by a networked computer and the resulting timestamp and hash value from the virus check is added to a database or memory table (e.g., see appellant's specification, par. 38, 50, 51, 60, 61; original claims 21 and 33).

However, the specification is clear that the timestamp corresponds to the execution time. For example, paragraph 38 states "The time stamp of an executable computer code corresponds to an earliest moment this particular computer code was allowed to execute by computers 2, 3." The specification does state that the time stamp can be placed in the memory table after the file is

virus scanned, and that the time stamp can be the time that the hash value was placed in the table. However, the specification describes these events as occurring at the time of first execution.

At page 21, the Examiner responds to Appellants' arguments by making a semantic distinction:

In response, the examiner respectfully notes that the claims do not recite *"time stamping the earliest or first time code was executed"*.

Instead, the claim language more explicitly states that the timestamp corresponds to **"an** earliest moment the computer code was allowed to execute on a computer coupled to the computer network" and **"a** first time the computer code was allowed to execute on a computer coupled to the computer network".

(emphasis in original). Thus, the Examiner is arguing that Appellants use of "an" and "a" in the claims supports the Examiner's interpretation. However, the antecedent basis requirements of 35 U.S.C. § 112, second paragraph, and the MPEP compel such phrasing. *See* MPEP 2173.05(e). It is unreasonable to use phrasing dictated by the rules to support an interpretation favored by the Examiner at the expense of Appellant.

At the core, the Examiner's argument is that any given time stamped execution is the "earliest" or "first" one because any executions that came before it can be excluded. Thus, if there were three sequential executions, the Examiner would call execution two "an earliest" execution because it occurred before execution three, even though execution one occurred still earlier. This interpretation is clearly unreasonable and the rejections of the claims should be reversed for at least this reason.

For the foregoing reasons, as well as for those previously articulated in the Appeal Brief of February 13, 2009, Appellants believe that the Examiner's rejection of the claims is clearly erroneous, and respectfully request that the Board reverse the rejection.

Respectfully submitted,
CAREY S. NACHENBERG ET AL.

Dated: June 16, 2009

By: /Brian Hoffman/

Brian M. Hoffman, Reg. No. 39,713
Attorney for Appellants
FENWICK & WEST LLP
801 California Street
Mountain View, CA 94041
Phone: (415) 875-2484
Fax: (650) 938-5200